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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEONARD E. HELLER, SECRETARY,
KENTUCKY CABINET FOR HUMAN RESOURCES,
Petitioner,

v.

SAMUEL DOE, BY HIS MOTHER AND
NEXT FRIEND, MARY DOE *ET AL.*,
Respondents.

On Writ of Certiorari to the United Court of Appeals for the Sixth Circuit

BRIEF OF THE MENTAL HEALTH LAW PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

LEONARD S. RUBENSTEIN
MENTAL HEALTH LAW PROJECT
1101 - 15th Street, NW
Suite 1212
Washington, D.C. 20005
(202) 467-5730

JOHN TOWNSEND RICH
(Counsel of Record)
CHRISTOPHER E. PALMER
SHEA & GARDNER
1800 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 828-2000

Counsel for the Mental Health Law Project

January 11, 1993

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BRIEF OF THE MENTAL HEALTH LAW PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

The Mental Health Law Project ("MHLP") is an independent non-profit organization that, for twenty years, has been devoted to the development of the law affecting

[1] This brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk.

people with mental illness and mental retardation. MHLP has written model laws, advocated protective legislation, and participated either as counsel or *amicus curiae* in virtually all civil cases concerning mental disability law that have come before this Court. MHLP submitted briefs as counsel for the plaintiff in *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), concerning release of a non-dangerous patient in the absence of treatment; *Addington* v. *Texas*, 441 U.S. 418 (1979), concerning the standard for civil commitment of persons with mental illness; *Bowen* v. *City of New York*, 476 U.S. 467 (1986), concerning jurisdiction for class-wide challenges to Social Security Administration practices; and *Washington* v. *Harper*, 494 U.S. 210 (1990), concerning involuntary administration of medication to a prisoner. It has submitted briefs *amicus curiae* in many other disability law cases as well, including *Mills* v. *Rogers*, 457 U.S. 291 (1982), *Parham* v. *J.L.*, 442 U.S. 584 (1979), *Pennhurst State School* v. *Halderman*, 465 U.S. 89 (1984), *Board of Education* v. *Rowley*, 458 U.S. 176 (1982), and *Zinermon* v. *Burch*, 494 U.S. 113 (1990).

INTRODUCTION

This case comes to the Court after more than ten years of litigation in the lower courts concerning the constitutionality of Kentucky's standards and procedures for the commitment and retention of adults with mental retardation in State residential facilities. The details of that litigation history are set forth in the briefs of the parties, and we shall not repeat them here. A brief review of that history demonstrates, however, that the issues that dominated this litigation were decided in an earlier stage of this case, as to which this Court denied certiorari, and as to which the State abandoned its objections by enacting a new statute largely reflecting the prior court decisions. What remains of this case are two procedural issues as to which, as we

demonstrate below, this Court improvidently granted certiorari.

When this case began, Kentucky law provided for the involuntary commitment of people with mental retardation under a statute that required the same rights and procedures as were applicable to people with mental illness. JA 91-93. Nevertheless, the State was admitting most people with retardation through allegedly "voluntary" commitment procedures, on the application of a parent or guardian. JA 50. In January 1986, the district court ruled, among other things, that the State must follow the involuntary commitment procedures applicable to people with mental illness, which required a judicial hearing, when committing adults with profound or severe retardation. JA 73.

In response, the State enacted House Bill No. 477 ("H.B. 477"), which eliminated the linkage between procedures for the commitment of people with mental illness and those for people with mental retardation. Instead, it specifically provided, in new Ken. Rev. Stat. Ann. § 202B.040(5), that commitment of people with mental retardation by their parents or guardians, following review by a newly-required interdisciplinary team, would be deemed "voluntary" rather than "involuntary." JA 75, 77. In November 1986, the district court, among other things, struck down the new provision as a violation of the Equal Protection and Due Process Clauses. JA 79, 88-89.

In 1988, the Sixth Circuit affirmed the district court's ruling that the commitment of adults with mental retardation by their parents or guardians must be considered involuntary, while affirming or reversing and remanding with respect to other district court rulings on the constitutionality of H.B. 477. *Doe* v. *Austin*, 848 F.2d 1386 (6th Cir. 1988)

(JA 90-91, 99-101).[2] This Court denied the State's petition for writ of certiorari. 488 U.S. 967 (1988) (No. 88-565).

In response, the State enacted in 1990 a substantial revision of the statutory provisions relating to the commitment of people with mental retardation. Among other things, the new law provides for the voluntary commitment of adults with mental retardation only if they are only "mildly or moderately mentally retarded" and, in the opinion of a physician, possess "the mental capacity to give informed consent for admission." H.B. 511, § 4(2), adding Ken. Rev. Stat. Ann. § 202B.021(2) (Michie Supp. 1992), JA 116, 120. All other adults with mental retardation must be committed through involuntary commitment procedures, which now require a judicial hearing. H.B. 511, § 9, adding Ken. Rev. Stat. Ann. § 202B.100 (Michie 1991), JA 124. No issue relating to these provisions remains in the case.

Another provision of H.B. 511 established "clear and convincing evidence" as the standard of proof in involuntary commitment proceedings for people with mental retardation. H.B. 511, § 15(2), adding Ken. Rev. Stat. Ann. § 202B.160(2) (Michie 1991), JA 128. Still other provisions permitted parents, guardians, and other third parties to participate as parties in involuntary commitment proceedings, with the right to appeal adverse decisions. H.B. 511 §§ 13, 15(3), 22, JA 127, 128, 132. Plaintiffs challenged these new provisions, as well as several others,

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[2] The court of appeals also (1) reversed the district court's ruling that due process required a judicial hearing for involuntary commitment of adults with mental retardation, but affirmed the ruling that the procedures of H.B. 477 otherwise failed to satisfy due process; (2) affirmed the ruling that the Equal Protection Clause required a judicial hearing for involuntary commitment of adults with mental retardation; and (3) reversed the district court's ruling that due process required periodic judicial review of involuntarily committed adults but affirmed the ruling that equal protection required such review. JA 101-109.

and the district court struck these provisions down as unconstitutional. JA 160, 169-70.

In the decision brought here for review, the Sixth Circuit affirmed the district court in pertinent part. *Doe* v. *Cowherd*, 965 F.2d 109 (6th Cir. 1992) (JA 171). First, because Kentucky law continued to require proof "beyond a reasonable doubt" for the involuntary commitment of people with mental illness, the court ruled that the new provision requiring only proof by "clear and convincing evidence" for the involuntary commitment of people with mental retardation violated the Equal Protection Clause, because the State had failed to provide a rational basis for its distinction. 965 F.2d at 112-113, JA 174-177. Second, because Kentucky law did not authorize the participation of "third parties" in proceedings for the involuntary commitment of people with mental illness and provided no rational basis for this distinction, the new provisions authorizing such participation in proceedings for the involuntary commitment of people with mental retardation violated the Due Process and Equal Protection Clauses. 965 F.2d at 113, JA 177.

The State sought review of these two holdings -- and no others -- in its current petition for writ of certiorari, which this Court granted. Pet. i.

SUMMARY OF ARGUMENT

This Court should dismiss certiorari as improvidently granted.

A. The State's lead argument -- that Kentucky can constitutionally commit adults with mental retardation upon application of their parents or guardians without going through involuntary commitment proceedings -- was not presented in the petition for writ of certiorari and is, in any event, moot. That issue was decided by the Sixth Circuit in its prior 1988 decision, as to which this Court denied

certiorari. It was not raised again in the current petition. Moreover, since the Sixth Circuit's 1988 decision, the State has substantially revised its statutes and no longer permits "voluntary" commitment of adults with mental retardation upon application of parents or guardians. Thus the State's argument concerns a superseded statutory regime. The State's emphasis on this argument strongly suggests that the State has little concern with the issues it did include in its petition and that therefore certiorari was improvidently granted.

B. A resolution by this Court of the constitutionality of Kentucky's lower standard of proof for the involuntary commitment of people with mental retardation than for those with mental illness would be of little significance in Kentucky or in other states. Since Kentucky refers to its "beyond a reasonable doubt" standard for people with mental illness as "unreasonable," "improvident[]," "inappropriate," "perhaps unwise[]," and a "mistake," Pet. Br. 29-30, the State manifestly has no serious interest in preserving the distinction and, indeed, may well correct the "mistake" without this Court's assistance. Moreover, the constitutional issue has little significance elsewhere, since no other state has the same distinction as Kentucky. Finally, Kentucky's distinction may be prohibited by the newly-enacted Americans with Disabilities Act.

C. Kentucky's statutes permitting participation of parents, guardians, and other third parties in involuntary commitment proceedings are so broad and vague, and the State's defense of them so cursory, that the constitutional question is neither clearly defined nor well-presented. A Supreme Court decision on such a record will inevitably affect the statutory commitment schemes of virtually every state, without the benefit of detailed briefing on the different statutory schemes of such states and without the benefit of a number of lower court decisions addressing such issues in

different contexts. The result may be to create more difficulties in the field, rather than to make it easier for states to make proper provision for the appropriate care, housing, and habilitation of people with mental retardation.

ARGUMENT

CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

A. The State's Lead Argument Was Not Presented in the Petition and, in Any Event, Is Moot Because It Concerns the Constitutionality of a Superseded Statutory Regime.

The State's lead argument is that its admission of adults with mental retardation to certain residential facilities "as voluntary residents upon the substituted consent of their legal guardians and after independent professional review does not violate either Due Process or Equal Protection." Pet. Br. 20. As we show below, this issue is not properly presented, as it was omitted from the petition, and, in any event, is moot, as it concerns the constitutionality of a superseded statutory regime.

The latest district court and Sixth Circuit decisions in this case do not address the State's lead argument. That argument was rejected in the earlier Sixth Circuit decision in this case, where the court of appeals held that "the commitment of mentally retarded adults by the Commonwealth upon application by a parent or guardian is to be considered involuntary." *Doe* v. *Austin*, 848 F.2d 1386, 1392 (6th Cir. 1988) (JA 90, 101). Accordingly, the Sixth Circuit found unconstitutional Ken. Rev. Stat. Ann. § 202B.040(5), by which Kentucky "deemed admissions initiated by a parent or guardian to be voluntary, with no regard for the actual wishes of the committed person." 848

F.2d at 1392, JA 99-101.[3] It also rejected the argument that "the due process protections which are a part of the formal guardianship hearing, [Ken. Rev. Stat. Ann. §] 387.500 *et seq.*, vitiate the need for a hearing at the time of commitment," finding those procedures -- which might have occurred long before commitment -- to be "a poor substitute for a contemporaneous hearing." 848 F.2d at 1392 n.4, JA 101 n.4. The State sought Supreme Court review of these issues,[4] but this Court denied certiorari. 488 U.S. 967 (1988) (No. 88-565).

As a procedural matter, the State was entitled to present in its latest petition for writ of certiorari questions of continuing significance that were decided in an earlier interlocutory decision, despite the fact that this Court previously denied certiorari. See *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973). But the State chose not to present again any question decided in the 1988 decision. Instead, it presented only questions decided by the Sixth Circuit in 1992 concerning the differing

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[3] At the time of the 1988 decision, Ken. Rev. Stat. Ann. § 202B.040(5) provided:

> "The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center *shall not be considered an involuntary commitment under this section*, provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in K.R.S. 202B.010 and the subsequent admission fully complies with the provisions of K.R.S. Chapter 202B." 848 F.2d at 1390, JA 96 (emphasis added).

[4] The pertinent question presented read: "Do admissions procedures of state residential treatment center for mentally retarded that permit guardian to provide substituted consent of his adult ward for admission to facility on voluntary basis violate Due Process or Equal Protection Clauses?" 57 U.S.L.W. 3319 (Nov. 1, 1988).

standards of proof for commitment of people with mental illness and those with mental retardation as well as the differing provisions regarding participation of parents and guardians in such commitment proceedings. This Court's almost invariable practice is not to entertain questions omitted from the petition for writ of certiorari and not subsumed within the questions presented. See Sup. Ct. R. 14.1(a). Kentucky's election not to renew its request for review of the 1988 decision should be conclusive.

Even if it had been properly presented, Kentucky's lead argument would still be inappropriate for consideration by this Court. In response to the Sixth Circuit's 1988 decision, Kentucky in 1990 substantially amended its commitment law for people with mental retardation. H.B. 511, JA 116. In particular, Kentucky repealed Ken. Rev. Stat. Ann. § 202B.040(5) -- the provision that the Sixth Circuit had found unconstitutionally deemed commitments initiated by parents or guardians to be voluntary. H.B. 511, § 7, JA 122. In its place, Kentucky added provisions expressly authorizing the voluntary admission of *minors* with mental retardation -- but not adults -- upon application of a parent or guardian. H.B. 511, § 4, adding Ken. Rev. Stat. Ann. § 202B.021 (Michie Supp. 1992), JA 120. The same provision authorizes the voluntary admission of a "mildly or moderately retarded adult person * * * who, in the opinion of the physician, possesses the mental capacity to give informed consent for admission." *Id.* There is no provision for the "voluntary" admission of adults with mental retardation who lack such capacity, even at the request of a parent or guardian.

In its petition, Kentucky conceded that its statutes no longer permit it to treat as a voluntary admission the commitment of an adult with mental retardation upon application of his or her parent or guardian. To the contrary, it admitted that the 1990 "sweeping revisions" of the statute brought "the Commonwealth's admission

procedures for the mentally retarded into compliance with the Sixth Circuit's [1988] decision in *Doe* v. *Austin* and * * * address[ed] other issues that had arisen since the Commonwealth began utilizing judicial involuntary admission proceedings to authorize admissions to [its] mental retardation facilities." Pet. 6. The State further represented that only two issues remained -- the standard of proof and the participation of third parties. Pet. 6-7.

Thus, because Kentucky no longer permits admission of adults with mental retardation upon application of parents or guardians without a judicial proceeding, the issue decided by the Sixth Circuit in 1988 is now moot.[5] A ruling by this Court would directly affect the constitutionality of other States' commitment procedures for people with mental retardation, without the benefit of a full record, full briefing, and decisions below on the details of those state schemes.[6] This Court's past decisions on commitment procedures for people with mental illness show that such issues are difficult and require close attention to the details of the statutory scheme. *E.g.*, *Foucha* v. *Louisiana*, 112 S. Ct. 1780 (1992); *Zinermon* v. *Burch*, 494 U.S. 113 (1990). Even the states supporting petitioner as *amici curiae* are concerned about a

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[5] The State does not contend, and we believe cannot reasonably contend, that the 1986 district court judgment and preliminary injunction (JA 88) prevents it from again amending its law with respect to this issue if it chooses to do so. The 1991 district court judgment and preliminary injunction (JA 169), entered after plaintiff presented his objections to the 1990 law, appears to have superseded the 1986 order dealing with the previous law.

[6] For example, as we show below, some states permit admission of adults with mental retardation under their voluntary commitment procedures on application of a duly authorized guardian. See pp. 13-14 *infra* (describing Hawaii and Massachusetts procedures). See also Brief of the States of New Jersey, Indiana, Michigan, Minnesota, Nebraska, South Dakota, and Virginia as *Amici Curiae* in Support of Petitioner ("Br. of New Jersey *et al.*") at 13, 2a-4a (listing 33 states as authorizing admission by guardians).

broad ruling. See Br. of New Jersey *et al.*, at 15. This Court should decline Kentucky's request that it venture into these waters on this record.

Since the State's lead argument was not presented in the petition and, in any event, is moot, the Court could simply refuse to address that one argument but proceed with the remainder of the case. But we suggest that the Court go further and dismiss certiorari. The State's emphasis on this argument about superseded voluntary commitment procedures strongly suggests that it has little serious concern with the issues presented in the petition and thus properly before this Court. For this reason -- coupled with the reasons discussed below why the remaining issues are not suitable for Supreme Court review -- certiorari should be dismissed as improvidently granted with respect to the entire case.

B. A Ruling on the Constitutionality of Kentucky's Burden of Proof Would Be of Limited Significance.

Resolution of Kentucky's second question -- the constitutionality of a lower standard of proof for the commitment of people with mental retardation than for those with mental illness -- would be of limited significance for several reasons.

Most strikingly, this issue appears to be of little significance to Kentucky itself. The State characterizes its own "beyond a reasonable doubt" standard for people with mental illness as "unreasonable," "improvident[]," "inappropriate," "perhaps unwise[]," and a "mistake." See Pet. Br. 29-30. By these words, the State has virtually abandoned any reasoned defense of its differing standards of proof. While the State lists numerous differences between people with mental retardation and people with mental illness, it never explains why those reasons counsel in favor of a lower standard of proof for the commitment of people with mental retardation. For example, its contention that

"[m]ental retardation is not subject to the same subtleties in diagnosis as mental illness," Pet. Br. 32, appears to support a *higher* standard of proof for people with mental retardation.[7] Moreover, Kentucky's characterization of its standard for the commitment of people with mental illness as a "mistake" shows that the State can solve its equal protection problem without involvement of this Court by simply amending that standard, without damage to significant State interests. The State's failure to defend its statutory scheme -- which the petition did not presage -- shows that certiorari was improvidently granted on this issue.

Moreover, Kentucky is apparently the only state that requires proof "beyond a reasonable doubt" for the involuntary commitment of people with mental illness and proof by "clear and convincing" evidence for the involuntary commitment of people with mental retardation. In *Addington* v. *Texas*, 441 U.S. 418, 431 n.5 (1979), this Court identified thirteen states and the District of Columbia as those jurisdictions having the "beyond a reasonable doubt" standard for people with mental illness. Of those fourteen jurisdictions, ten have switched to the "clear and convincing"

[7] Other distinctions recognized by the State and its *amici* appear to support a higher standard of proof for people with mental retardation than for those with mental illness. Mental illness "can be and usually is successfully treated with modern medications." Pet. Br. 31. Thus, people with mental illness are usually committed to a hospital for a period of acute care and then, after their condition is stabilized, they are released. *Id.* By contrast, mental retardation is a relatively permanent condition, and those who are committed receive continuing custodial care, not treatment designed to cure or bring under control an illness. *Id.* See also Br. of New Jersey *et al.*, at 7, 10; Br. of The Concerned Families of Hazelwood Center, ICR/MR, Inc. (Louisville, Kentucky), *et al.*, as *Amici Curiae* in Support of Petitioner, at 9; Br. of Voice of the Retarded *et al.* as *Amici Curiae* in Support of Petitioner, at 5.

standard[8] and two have switched to a mixed standard.[9] Other than Kentucky, Massachusetts is the only state to retain the "beyond a reasonable doubt" standard for all issues in the involuntary commitment of people with mental illness, *D.L.* v. *Commissioner of Social Services*, 412 Mass. 558, 564 n.11, 591 N.E.2d 173, 176 n.11 (1992), but, unlike

[8] See Idaho Code § 66-329(k) (Supp. 1992); Kan. Prob. Code Ann. § 59-2917(f) (Vernon Supp. 1992); Minn. Stat. Ann. § 253B.18 (West Supp. 1992); N.J. Stat. Ann. § 30:4-27.15 (West Supp. 1992); Okla. Stat. title 43A, § 5-401 (Supp. 1992); Or. Rev. Stat. § 426.130 (1991); Utah Code Ann. § 62A-12-234(10) (Supp. 1992); Wis. Stat. Ann. § 51.20(e) (West 1987); *In re Sanborn*, 130 N.H. 430, 545 A.2d 726 (1988); *In re Nelson*, 408 A.2d 1233 (D.C. 1979).

[9] To involuntarily commit people with mental illness in Hawaii, the state must prove beyond a reasonable doubt that the person is mentally ill, but need only prove by clear and convincing evidence (i) that the person is imminently dangerous to self or others or is gravely or obviously ill, and (ii) that the person is in need of care or treatment and there is no suitable available alternative that is less restrictive. Haw. Rev. Stat. §§ 334-60.2, 334-60.5(i) (1985 & Supp. 1991). Hawaii has no parallel procedure for the involuntary commitment of people with mental retardation. Instead, it permits the admission of adults with mental retardation upon application of a guardian who is specifically authorized to take that step. *Id.* § 333F-9(d).

To involuntarily commit people with mental illness in Montana, the state must prove its case beyond a reasonable doubt with respect to any physical facts or evidence, to a reasonable medical certainty with respect to mental disorders, and by clear and convincing evidence as to all other matters. Mont. Code Ann. § 53-21-126(2) (1991). Montana's procedure for the involuntary commitment of people with mental retardation is quite different. Commitment is allowed after recommendation by a "residential facility screening team" and the opportunity for a judicial hearing. *Id.* §§ 53-20-121, 53-20-125, 53-20-133. The statute does not specify the standard of proof applicable to either the screening team decision or the court proceeding.

The Sixth Circuit decision, of course, is not binding in either Hawaii or Montana, which lie in other Circuits. In any event, a Supreme Court decision on the constitutionality of Kentucky's distinction would not necessarily resolve the constitutionality of the different distinctions made by these other states.

Kentucky, Massachusetts does not have a parallel involuntary commitment procedure for people with mental retardation, Mass. Gen. Laws Ann. ch. 123B, §§ 5-7 (West Supp. 1992).[10] Thus it appears that any ruling on the constitutionality of Kentucky's distinction will have little relevance beyond Kentucky.[11]

Finally, Kentucky's distinction may be prohibited by the recently-enacted Americans with Disabilities Act ("ADA"). Since courts will generally seek to resolve cases on statutory grounds that avoid constitutional questions, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring), the enactment of the ADA further diminishes the importance of the Sixth Circuit's decision on the constitutional question. Congress intended the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (Supp. II 1990).[12] Congress found, among other things, that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of

[10] Massachusetts permits the voluntary admission of both adults with mental illness and adults with mental retardation upon application of a duly authorized guardian. Mass. Gen. Laws Ann. ch. 123, § 10(a) (West Supp. 1992); *id.* ch. 123B, § 6. Similar procedures, including court approval, apply to both groups. *Id.* ch. 201, §§ 6, 6A (West 1990).

[11] Michigan apparently uses the "clear and convincing" standard for involuntary commitment of people with mental illness and the "preponderance of the evidence" standard for the involuntary commitment of people with mental retardation. See Br. of New Jersey *et al.*, at 18 n.6. But since Michigan uses the "clear and convincing" standard for appointment of guardians for people with mental retardation, *id.*, it is not clear what practical difference the distinction makes.

[12] The relevant portion of the ADA, passed in 1990, became effective on January 26, 1992, long after the district court decision below. Pub. L. No. 101-336, § 205(a), 104 Stat. 338 (1990).

discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *Id.* § 12101(a)(2) (Supp. II 1990). It also found that individuals with disabilities continually encounter various forms of discrimination including "overprotective rules and policies." *Id.* § 12101(a)(5) (Supp. II 1990). One of the means by which Congress effectuated that its overall purpose was through the following broad prohibition: "[N]o qualified individual with a disability shall, by reason of such disability * * * be subjected to discrimination by any [public] entity." *Id.* § 12132 (Supp. II 1990). The ADA defines the term "qualified individual with a disability" as "an individual with a disability who * * * meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2) (Supp. II 1990). Individuals with mental retardation whom a state is trying to commit appear to fall within that definition. Retardation is a disability,[13] and in seeking to commit an individual with retardation, the State takes the position that the statutory requirements for receipt of the relevant state services are met. Thus the State's lower standard of proof for committing individuals with mental retardation than for committing those with mental illness may violate the ADA. If in fact it does, future cases will not present the equal protection issue. Dismissing certiorari would permit the lower courts in future cases to address the statutory question first.[14]

[13] The ADA defines "disability" to include "a physical or mental impairment that substantially limits one or more of the major life activities," 42 U.S.C. § 12102(2), and the regulations provide that "mental retardation" is a "physical or mental impairment." See 28 C.F.R. § 35.104 (1992).

[14] Plaintiffs' complaint in this case included a claim of discrimination under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), the precursor of the ADA. JA 12. This claim was never ruled on by the lower

(continued...)

C. The Constitutionality of Kentucky's Statutes Permitting Third Party Participation Does Not Warrant Supreme Court Review.

Certiorari should also be dismissed with respect to the final issue in the case -- the constitutionality of permitting the participation of "third parties" in proceedings for the involuntary commitment of people with mental retardation. As we show below, Kentucky's provisions are so broad and vague, and the State's defense of them so cursory, that the constitutional issues are not sharply focussed. A Court ruling in those circumstances could unintentionally and unnecessarily call into question procedures of other states.

The lower courts found unconstitutional three sections added as part of the 1990 revisions. One permits "[g]uardians and immediate family members" to participate in the proceedings "as if * * * part[ies]" and grants them "standing to appeal any adverse decision." H.B. 511, § 15(3), adding Ken. Rev. Stat. 202B.160(3) (Michie 1991), JA 128. Another permits "the Commonwealth, the individual who is subject to the proceedings or the individual's guardian, limited guardian, or other authorized representative" to appeal. H.B. 511, § 22, adding Ken. Rev. Stat. 202B.230 (Michie 1991), JA 132. The third section permits a "qualified mental retardation professional retained by the * * * respondent's parent or guardian * * * to witness and participate in any examination of the respondent and may submit findings, if any, to the court." H.B. 511, § 13, adding Ken. Rev. Stat. 202B.140 (Michie 1991), JA 127.

These provisions on their face permit a large, diverse, and ill-defined class of persons to participate as parties with

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[14] (...continued)
courts. Future cases are much more likely to include and pursue claims under the ADA, because that statute manifests a strengthened national determination to eliminate discrimination against Americans with disabilities.

appeal rights in commitment proceedings, even though the State has determined that these persons cannot make commitment decisions on behalf of adults with mental retardation.[15] The term "immediate family members" is not defined by statute, but presumably includes parents, siblings, and children, whether or not they have been involved in the person's care. The term may also include step-parents, half-siblings and others, again regardless of their actual contact with or responsibility for the person with retardation. A "limited guardian" may be a person with no authority concerning where his or her ward lives or what type of care he or she receives.[16] The term "other authorized representative" is not defined and could mean virtually anyone since the statute does not say who must authorize the representative.

The State neither adequately justifies these very broad provisions nor demonstrates that they will be narrowly construed. What it does instead is cite the case of a mother who took care of her daughter with retardation for some 20 years, was appointed her guardian in a judicial proceeding, and then sought to have the daughter admitted to a state facility. The State's apparent point is that such a parent-guardian should be able to participate in a commitment

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[15] As explained in Part A, while Kentucky previously treated commitments of people with mental retardation at the request of their guardians as "voluntary" commitments, it no longer does so. Adults with mental retardation who lack the capacity to make their own decisions as to commitment may be committed only through "involuntary" commitment proceedings.

[16] A "limited guardian" is a "guardian who possesses fewer than all of the legal powers and duties of a full guardian, and whose powers and duties have been specifically enumerated by court order." Ken. Rev. Stat. Ann. § 387.510(4) (Michie Supp. 1992). Such a guardian may be appointed when a person is found to be only partially disabled in managing his or her personal affairs. *Id.* § 387.590(1) (Michie Supp. 1992).

proceeding because she would have to provide care for the child if commitment were denied. Pet. Br. 34-37. But that argument does not justify the breadth of the provisions, which permit participation of parents who may not have not seen their children in years, siblings who may not intend to take an active role in the care of their siblings with retardation, and certain unspecified "authorized representative[s]."[17]

The Sixth Circuit's decision therefore appears to be a holding that the State failed to justify its very broad statutory provisions, rather than a holding that a State can never permit *any* person other than the respondents themselves to participate in commitment proceedings or to appeal decisions in those proceedings. And since we are not aware of any state with a statutory scheme similar to Kentucky's, the Sixth Circuit's decision is not a sweeping ruling with wide-ranging impact. Moreover, the record does not even make clear what role parents and guardians have in Kentucky commitment proceedings as a result of the Sixth Circuit decision. It is unlikely that the State -- as the responsible party in an involuntary commitment proceeding -- intends to neglect or ignore the views of closely-involved parents or guardians. This decision, therefore, may have little practical effect in Kentucky.[18]

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[17] And as to why Kentucky includes these provisions for the commitment of people with mental retardation but not for the commitment of people with mental illness, the State simply says that the two groups are different. As in connection with the burden of proof issue, it does not explain why those differences justify different provisions. Pet. Br. 37-38.

[18] In fact, the Sixth Circuit's decision may not bar legal guardians with the full range of authority for their wards (as opposed to limited guardians) from appealing decisions in involuntary commitment proceedings. Despite the apparent breadth of the district court's order striking down H.B. 511 § 22 as unconstitutional (JA 169), we do not understand either party to take

(continued...)

Although we know of no state with a statutory scheme similar to Kentucky's, many states do provide at least some role for parents and guardians in the commitment process. For example, as noted above, some states -- such as Hawaii and Massachusetts -- allow guardians to participate in commitment proceedings, because the state treats the admission of an adult with mental retardation at the request of a properly authorized guardian as a "voluntary" admission. See pp. 13-14 *supra*; Br. of New Jersey *et al.*, at 13. The appropriate role of parents and guardians in proceedings concerning the care of their adult children or wards with mental retardation is a difficult issue in general, and results in particular cases will depend heavily on the details of the state's statutory scheme and the manner in which that scheme is implemented. While the time may come when this Court will find it necessary to address the constitutionality of statutory schemes permitting or forbidding "third-party" participation in such proceedings, this is not the case in which to do so. A ruling by this Court in this case will inevitably affect the statutory commitment schemes of virtually every state, without the benefit of detailed briefing on those schemes and without the benefit of a number of lower court decisions addressing such issues in different contexts. A premature ruling by this Court is as likely to create more difficulties in a field that needs no further complications as it is to make it easier for states to provide for the appropriate care, housing, and habilitation of people with mental retardation.

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[18] (...continued)
the position that the court struck down that portion of § 22 which permits the individual respondent to appeal. Since guardians have broad authority to act on behalf of their wards, see Ken. Rev. Stat. § 387.660 (Michie 1991), Pet. Br. 7a-8a, a fully-authorized guardian may, for all the record shows, be able to appeal in the name of the ward.

CONCLUSION

For the foregoing reasons, the Court should dismiss certiorari as improvidently granted.

Respectfully submitted,

Leonard S. Rubenstein
Mental Health Law Project
1101 - 15th Street, N.W.
Suite 1212
Washington, D.C. 20005
(202) 467-5730

John Townsend Rich
(Counsel of Record)
Christopher E. Palmer
Shea & Gardner
1800 Mass. Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for the Mental Health Law Project

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